

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRENDA JUNE PIOTROWSKI,

Defendant-Appellee.

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UNPUBLISHED

May 19, 2005

No. 251670

Macomb Circuit Court

LC No. 03-000171-AR

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In this interlocutory appeal, plaintiff appeals by leave granted a circuit court order affirming a district court order suppressing the results of defendant's breathalyzer test and denying defendant's motion to dismiss. We affirm the decisions of the lower courts that defendant was deprived of her statutory right to an independent test under MCL 257.625a(6)(d), but reverse the decisions of the lower courts denying defendant's motion to dismiss and remand for entry of an order dismissing the charge against defendant with prejudice.

After being arrested for drunk driving around 1:00 a.m. on May 25, 2002, defendant was transported to the county jail. Defendant's attorney had been apprised of defendant's arrest by the passenger in defendant's car. Defendant's attorney arrived at the jail around 1:30 a.m., and was informed by the desk lieutenant that defendant was in the process of being given a breathalyzer test. Defendant's attorney asked if he could speak to defendant in person before she took the test; however, this request was denied by the booking sergeant. Defendant's attorney then asked if he could speak to defendant on the phone before she took the test; however, this request was also denied by the booking sergeant. The desk lieutenant told defendant's attorney that he could leave his card and that they would have defendant call him in the morning when she was released.

Defendant's attorney then told the desk lieutenant that he wanted defendant to have an independent test if the results of the breathalyzer showed that she was intoxicated. However, defendant's attorney was informed that he would have to arrange an independent test with the arresting officer. Defendant's attorney was informed by the arresting officer that the results of the breathalyzer test revealed that defendant's blood alcohol level was .12. Defendant's attorney then asked the arresting officer if defendant could have an independent test. The arresting officer told defendant's attorney that he was only a state trooper and that it was the responsibility of the sheriff's department to arrange an independent test. Defendant's attorney relayed this

information to the desk lieutenant; however, he was informed that the state trooper was mistaken. Defendant's attorney then stated that it did not matter whose responsibility it was, but that he just wanted defendant to undergo an independent test. The desk lieutenant then stated that there was nothing he could do if the state trooper would not arrange an independent test, but that if defendant's attorney wanted to wait, they would release defendant sometime after 6:00 a.m. Defendant's attorney left the jail around 1:55 a.m.

Defendant was charged with operating under the influence of intoxicating liquor, MCL 257.625. Defendant moved to quash the results of the breathalyzer test and to dismiss the case. Defendant argued that she was denied her right to due process under the Fifth and Fourteenth Amendments. Specifically, defendant argued that her right to counsel was violated because she was not informed that her attorney was present at the jail. Defendant also argued that she was deprived of her statutory right to an independent test.

In response to defendant's motion to quash, plaintiff argued that defendant's due process rights were not violated because defendant's right to counsel had not attached at the time of her breathalyzer test because adversarial judicial proceedings had not yet been initiated against her. Plaintiff also argued that defendant's right against self-incrimination was not implicated because a breathalyzer test is not the type of testimonial self-incrimination subject to protection under the Fifth Amendment. Finally, plaintiff argued that defendant failed to present case law to support her position that even though she personally chose not to have an independent test, her attorney could supersede her wishes and demand a second test. Plaintiff asserted that there is no police requirement to comply with the demands of an attorney when a defendant has not demanded an independent test. Plaintiff, however, misconstrued defendant's argument by implying that after being informed of her statutory right, defendant failed to request an independent test. Indeed, in its response to defendant's motion to quash, plaintiff acknowledged that whether defendant waived her right to an independent test was unclear.

At the hearing on defendant's motion to quash, the district court framed the issue in terms of whether defendant had a right to counsel to advise her to take an independent test after she had been given a breathalyzer test. The district court then made the following findings of fact and conclusions of law:

And I think it all boils down to whether or not the defendant had a right to counsel to advise her to take a preliminary—to take an independent breath test after she had taken the Datamaster. And there clearly is no law that clearly states one way or another whether it is. And I think that the law that [defense counsel] cited in his brief indicated that the defendant is entitled to counsel at every critical stage of prosecution. However, charges had not been filed yet. But I'm going to error on the side of the defendant in that what I'm going to do is I am going to suppress the results of the Breathalyzer that was given. I am not going to dismiss the case. She did waive her right. And it is clearly by all law that I can tell her right to the independent test and she waived it herself. And the issue comes down to whether or not she was entitled to [c]ounsel to give her advi[c]e on whether or not she should request an independent test. And because she was denied that, I am going to rule that all test results of the breathalyzer are to be suppressed. She will go to trial based on just other evidence that may exist[], other than the breathalyzer test. Okay, so I'm not going to do an outright dismissal because of the ambiguity of

whether this was a critical stage and whether she even had a right to counsel at that time. But in all fairness to her, if somebody did get an attorney for her, they wanted her to use that attorney's advice and she was denied access to it, I believe that that cuts in her favor as far as suppressing the breathalyzer, and I will do that.

The parties appealed the case to the circuit court: defendant argued that while the district court properly excluded the results of her breathalyzer test, it erred in failing to dismiss the case. Plaintiff argued that the district court erred in suppressing the breathalyzer test results, and sought remand for trial where the results of defendant's breathalyzer test would be admissible. It appears that plaintiff seized on the district court's erroneous finding that defendant waived her right to an independent test, and misrepresented the district court's finding as a "stipulat[ion] that the defendant was advised of her right to an independent test and declined to have one." At the hearing, plaintiff again misrepresented the circumstances surrounding defendant's breathalyzer test when it made the following argument to the circuit court:

[T]he defendant very clearly refused a second test. The defendant was informed she had the right to a second test and said she didn't want it. She did that without the benefit of counsel and that's the issue here, does she have the right to counsel present to make the decision as to whether or not she should take a second test. And in this case after being informed can counsel overrule her decision without even conferring with her.

The circuit court affirmed the district court's suppression of the breathalyzer test results as well as its decision not to dismiss the case.

Plaintiff now argues that the circuit court erred in affirming the district court's suppression of the breathalyzer test results, and seeks reversal of that determination and remand for trial where the results of defendant's breathalyzer test would be admissible. However, plaintiff argues that the circuit court properly affirmed the district court's denial of defendant's motion to dismiss, and seeks affirmance of that determination. To the extent plaintiff frames the issue in terms of whether defendant's attorney can supersede her decision to forego an independent test, we find that this is inconsistent with the lower court record. That record reveals that defendant did not waive her right to an independent test; she simply went forward with the standard breathalyzer test without affirmatively requesting an independent test as provided for by statute.

MCL 257.625a(6)(d) provides in pertinent part:

A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention.

Pursuant to the statutory language, the relevant inquiry is whether defendant was given a reasonable opportunity to have an independent test performed by a person of her own choosing, within a reasonable time after her detention. *People v Prelesnik*, 219 Mich App 173, 180; 555 NW2d 505 (1996), overruled in part on other grounds *People v Wagner*, 460 Mich 118, 123-124; 594 NW2d 487 (1999). We conclude that she was not. The failure of the police, for whatever reason, to facilitate an independent test when defendant's attorney was present at the jail and making repeated requests that one be arranged clearly deprived defendant of her statutory right to a "reasonable opportunity" to obtain an independent test.

This Court has recognized that dismissal of an OUIL charge is an appropriate remedy when a defendant is deprived of her right to an independent test. *People v Green*, 260 Mich App 392, 406-407; 677 NW2d 363 (2004). See also *People v Hurn*, 205 Mich App 618, 620; 518 NW2d 502 (1994); *People v Dicks*, 190 Mich App 694, 700-701; 476 NW2d 500 (1991); *People v Willis*, 180 Mich App 31, 37; 446 NW2d 562 (1989); *People v Underwood*, 153 Mich App 598, 600; 396 NW2d 443 (1986); *People v Burton*, 13 Mich App 203, 207; 163 NW2d 823 (1968). This Court has explained that dismissal is a proper remedy because "the purpose of MCL 257.625a(6)(d) is to protect the motorist by ensuring that scientific evidence is not gathered by, and at the sole disposal of, only one party. . . ." *Green, supra* at 407. See also *People v Koval*, 371 Mich 453, 458; 124 NW2d 274 (1963); *Dicks, supra* at 699. In other words, the statute grants a defendant the right to develop independent scientific evidence that, beyond refuting the scientific evidence gathered for the benefit of the prosecutor, might also help disprove the charge in its entirety. This statutory intent can only be honored by dismissing the charge against defendant, rather than just disallowing the prosecutor from using the scientific evidence gathered by the police against her.

In this case, the police administered a breathalyzer test to defendant, but failed to facilitate an independent test when defendant's attorney was present at the jail and made repeated requests for an independent test. As our Supreme Court noted in *Koval, supra* at 458, "[t]he statutory requirement . . . is mandatory in form and should have been observed." Following this Court's directive that "respect for the statutory right [to an independent test] should be given willingly, and not reluctantly," we find that the conduct of the police in circumventing the attempts of defendant's attorney to obtain an independent test deprived defendant of the right to which she was statutorily entitled. *Underwood, supra* at 600. Accordingly, the proper remedy is dismissal with prejudice of the charge against defendant. Therefore, we reverse the decisions of the lower courts denying defendant's motion to dismiss.

In light of our determination that the charge against defendant must be dismissed because of the statutory violation, we need not address plaintiff's challenge to the constitutional and due process arguments advanced on defendant's behalf in the lower court proceedings.

We affirm the decisions of the lower courts that defendant was deprived of her statutory right to an independent test pursuant to MCL 257.625a(6)(d), but reverse the decisions of the lower courts denying defendant's motion to dismiss and remand for entry of an order dismissing the charge against defendant with prejudice. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra